79-442

Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

v.

ROMEO COMMUNITY SCHOOLS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The Solicitor General, on behalf of the United States Department of Health, Education, and Welfare, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 600 F.2d 581. The opinion of the district court (App. C, *infra*, 13a-47a) is reported at 438 F. Supp. 1021.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1979 (App. B, *infra*, 11a-12a). The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, authorized the Department of Health, Education, and Welfare to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance.

STATUTE AND REGULATIONS INVOLVED

1. The pertinent portions of the statute involved (Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682), are printed at pages 2-6 of the petition in *Harris* v. *Islesboro School Committee*, No. 79-200 (October Term 1978).

2. The pertinent regulations (45 C.F.R. 86.51(a)(1) and 45 C.F.R. 86.57(c)) are printed at pages 6-7 of the petition in *Islesboro*.

STATEMENT

This case arises from a suit brought by the respondent Romeo Community Schools ("Romeo") to enjoin regulations of the Department of Health, Education, and Welfare (HEW) prohibiting sex discrimination in the employment practices of those operating federally assisted education programs and activities.

Romeo receives financial assistance from HEW in support of its educational program, and it is therefore subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX") and to authorized regulations promulgated by HEW to effectuate those provisions.

To implement Section 901(a) of Title IX, 20 U.S.C. 1681(a), which provides that, with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federal education aid recipients. 45 C.F.R. 86.51 *et seq.*

On February 4, 1976, respondent Susan K. Garrard, a high school counselor employed by Romeo, filed a complaint with HEW alleging that Romeo's refusal to allow pregnant teachers to use sick leave for the period during which they are disabled by their condition constitutes sex discrimination by treating pregnancy differently from other temporary disabilities. After an investigation of the allegations of this complaint, HEW notified Romeo that its policy was in violation of both Title IX and 45 C.F.R. 86.57(c), and it requested that Romeo take corrective measures. Romeo responded by challenging HEW's authority to regulate employment under Title IX, and on July 9, 1976, filed suit in the United States Dis-

trict Court for the Eastern District of Michigan, challenging HEW's authority to issue and enforce its employment practices regulations, 45 C.F.R. 86.51 *et seq.*, and seeking to enjoin enforcement of the pregnancy leave regulation, 45 C.F.R. 86.57(c). Named as defendants were HEW and then Secretary of HEW, F. David Mathews. Respondent Garrard was permitted to intervene as a defendant.

On cross-motions for summary judgment, the district court declared invalid 45 C.F.R. 86.57(c), holding that 20 U.S.C. 1681(a) (Section 901(a) of Title IX) prohibited discrimination only against students and that "[t]eachers * * * are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face" (App. C, *infra*, 37a). The court also concluded that the legislative history of the statute did not demonstrate an intent to include employment discrimination within the coverage of Section 901(a) of Title IX.

The court of appeals affirmed, finding "HEW's construction of Title IX to be strained" (App. A, *infra*, 6a) and "[t]he arguments for reversal based on the legislative history * * * not persuasive" (App. A, *infra*, 8a). The court of appeals also relied upon the reasoning of the United States Court of Appeals for the First Circuit in *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1979), petition for cert. pending *sub nom. Harris* v. *Islesboro School Committee*, No. 79-200 (App. A, *infra*, 9a-10a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as that presented in the pending petitions in *Harris* v. *Islesboro School Committee, supra*, and in *Harris* v. *Junior College District of St. Louis*, No. 79-201.[1] All three cases involve the authority of HEW to issue regulations prohibiting those receiving federal financial assitance for education programs and activities from discriminating against their employees on the basis of sex. The regulations at issue here are the same as those at issue in *Islesboro*. It would therefore be appropriate for the Court to defer disposition of this petition pending final disposition of the petition in *Islesboro*.

CONCLUSION

The Court should defer disposition of this petition pending its disposition of *Harris* v. *Islesboro School Committee, supra*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

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[1] Copies of those petitions are being sent to counsel for the respondents.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1691
No. 77-1692

ROMEO COMMUNITY SCHOOLS, PLAINTIFF-APPELLEE,

v.

UNITED STATES DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE, ET AL.,
DEFENDANTS-APPELLANTS,

and

SUSAN K. GARRARD,
DEFENDANT-INTERVENOR-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed June 20, 1979

Before: WEICK, LIVELY and ENGEL, Circuit Judges

LIVELY, Circuit Judge. This appeal concerns Title IX, §§ 901-907 of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, codified at 20

U.S.C. §§ 1681-1686 (1976). Title IX, which prohibits sex discrimination, constituted a small part of the Education Amendments of 1972 which dealt with federal involvement in a wide range of activities of educational institutions at all levels. For legislative history and purpose of Pub. L. 92-318, see 1972 U.S. Code Cong. and Adm. News, p. 2462, et seq. The particular question for decision is whether section 901 (hereafter 20 U.S.C. § 1681)[1] applies only to students involved in programs or activities receiving federal financial assistance or applies additionally to employees of educational institutions receiving such assistance. The district court held that § 1681 does not deal with sex discrimination against employees of educational institutions, but was enacted to prohibit discrimination against students who are the intended beneficiaries of federal financial assistance to education. We agree and affirm.

This action was commenced by Romeo Community Schools (Romeo) seeking a declaratory judgment that Subpart E of Title IX regulations, 45 C.F.R. Part 86, were adopted and issued by the Secretary of Health, Education and Welfare (HEW) in excess

[1] The operative language is found in § 1681(a): "(a) No person in the United States, shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that . . . ." Nine exceptions are listed, which refer generally to activities of institutions and organizations which have traditionally offered admission or membership only to persons of one sex.

of the authority conferred by Congress. The particular regulation which was in dispute was 45 C.F.R. § 86.57.[2] Under the terms of its collective bargaining

[2] § 86.57 provides:

§ 86.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status

agreement, pregnancy is not treated by Romeo the same as other temporary disabilities for a number of job related purposes. Prior to filing its complaint in district court Romeo received a letter from the regional director of HEW demanding that it alter its practices with respect to pregnancy leave to conform to § 86.57(c) and reimburse and adjust the salaries and retirement credits of any employees who had not been permitted to use accrued sick leave while on pregnancy related leave since June 23, 1972. The letter from HEW also required assurances from Romeo that it would comply with § 86.57, and that reimbursement had been made. Romeo was advised that enforcement proceedings would be recommended under 45 C.F.R. § 80.83 [3] if these assurances were not received.

In his opinion Judge Feikens of the district court considered the legislative history of Title IX and its similarities to Title VI of the Civil Rights Act of 1964. However, his decision was based primarily upon the language of § 1681. The court concluded

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which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

[3] 45 C.F.R. § 80.8 provides for effecting compliance "by the the suspension or termination of or refusal to grant [or] to continue Federal financial assistance, or by any other means authorized by law." This regulation reflects the language of § 902 of Title IX, 20 U.S.C. § 1682, which provides for enforcing § 1681 by termination of or refusal to grant or continue assistance to any agency found in violation thereof, "or by any other means authorized by law."

that students, not employees of educational institutions, are the persons intended to be protected from sex discrimination by Title IX. *Romeo Community Schools* v. *U.S. Department of HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977). Though the published opinion refers to all of Subpart E of the Title IX regulations, the judgment which was actually entered declared only the regulations contained in 45 C.F.R. § 86.57 invalid.

Despite near unanimity among the courts which have considered the issue,[4] HEW argues that § 1681 was intended to prohibit sex discrimination in employment practices by educational institutions and that its regulations related to employees are authorized and valid. HEW asserts that the district court construed the language of § 1681 narrowly rather than broadly, an approach which is not permitted when considering civil rights legislation. Noting that the opening words of the section are "[n]o person," HEW maintains that it was error to restrict this broadest possible designator of beneficiaries by relying on later references to particular types of discrimination which are prohibited. In substance, it is

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[4] *See Isleboro School Comm.* v. *Califano*, 593 F.2d 424 (1st Cir. 1979), affirming *Brunswick School Bd.* v. *Califano*, 449 F.Supp. 866 (D. Maine 1978); *Junior College Dist. of St. Louis* v. *Califano*, —— F.2d —— (8th Cir. No. 78-1830, decided April 19, 1979), affirming 455 F.Supp. 1212 (E.D. Mo. 1978); *University of Toledo* v. *HEW*, 464 F.Supp. 693 (N.D. Ohio 1979); *McCarthy* v. *Burkholder*, 448 F.Supp. 41 (D. Kansas 1978); *but see Piascik* v. *Cleveland Museum of Art*, 426 F.Supp. 779 (N.D. Ohio 1976) (dictum in footnote).

the position of HEW that teachers and counselors, as well as students, are "persons" who participate in and benefit from federally assisted programs and are vulnerable to discrimination under such programs.

HEW seeks to bolster its argument by pointing out that none of the exceptions contained in § 1681(a)(1)-(9) excludes employment practices from coverage. This argument cuts both ways. An examination of these provisions discloses that each exception relates to students, student bodies or participants in programs. They are not concerned with teachers or staff. It may be fairly assumed that the exceptions relate to students because students are the subject of § 1681; that is, the exceptions deal with the same subject matter as that covered generally by the preceding language.

We find HEW's construction of Title IX to be strained. It seeks a reading of § 1681, "no person shall be discriminated against, on the basis of sex, in the operation of any educational institution receiving federal financial assistance." However, as actually written, the statute is not nearly so broad. The words "no person" are modified by later language which clearly limits their meaning. The concern of this particular statute is not with all discrimination against persons in any way connected with educational institutions which receive federal funding. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex "under any education pro-

gram or activity receiving Federal financial assistance . . . ." Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by § 1681.

This is a reasonable construction of the language, because Title IX does not stand alone. It is part of a mosaic of federal statutes which protect the rights of women and minorities. Two of the pre-existing federal laws which prohibited discrimination in employment were amended by § 906 of Pub. L. 92-318, the same statute which contained the operative and enforcement provisions of Title IX (§§ 1681 and 1682). These amendments to the Equal Employment Opportunities Act, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 213(a), brought employees of educational institutions engaged in educational activities within their coverage and prohibited discrimination on the basis of sex. The inclusion of these amendments to existing laws which closed loopholes relating to employment practices required that Pub. L. 92-318, for consistency, not contain a disclaimer similar to that contained in Title VI.[5] The elimination of this language does not indicate that Title IX was intended

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[5] Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary object of the Federal financial assistance is to provide employment.

to cover employment practices. Rather it reflects the fact that at that point in the legislative process such a provision in Pub. L. 92-318 would have been inaccurate and contradictory in light of this statute's extension of existing laws to cover employment practices of educational institutions.

Though the regulation by which HEW seeks to enforce Title IX's prohibition against discrimination speaks of "other means authorized by law," it is clear that discontinuance of federal financial assistance is the means of effecting compliance which is most available to HEW and the primary means contemplated by the enforcement provisions contained in § 1682. When this sanction is applied one result is that the students who are engaged in the federally funded activities suffer. This may be a reasonable burden for the students to bear when the object is to prevent or put an end to discrimination against students. However, it is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefits of federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits.

The arguments for reversal based on the legislative history of Title IX are not persuasive. Certain comments by Senator Bayh, sponsor of the bill which

became Title IX, are quoted. In these comments Senator Bayh stated that a purpose of the bill was the elimination of sex discrimination in employment by educational institutions. These statements appear to refer to § 906 of the bill then under consideration. Section 906 consisted of the amendments to the Civil Rights Act of 1964 and the Equal Pay Act previously referred to. The legislation which Senator Bayh sponsored was aimed at all sex discrimination in education. However, it provided a different approach to discrimination against students and against teachers and other school employees. This construction is supported by the summary of the bill contained in the Congressional Record. In this summary, by Senator Bayh, there is a breakdown which treats the prohibition against sex discrimination in federally funded education programs separately from the prohibition against discrimination in education-related employment. In describing the latter prohibition the summary refers specifically to the bill's expansion of coverage and eradication of loopholes in existing laws and describes the *remedies* under Title VII as "extremely effective." Cong. Rec., S5806-07 (daily ed. Feb. 28, 1972). These statements by the sponsor of the legislation strengthen our conclusion that Congress did not intend to deal with discriminatory employment practices when it enacted § 1681.

Both Judge Feikens in this case and Judge Bownes in *Isleboro School Comm.* v. *Califano, supra,* have fully answered the various arguments made in support of HEW's construction of § 1681. Since we find

both opinions to be in accord with our views, no purpose would be served by dealing with the arguments for reversal at length in this opinion.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 77-1691
77-1692

[Filed June 20, 1979]

ROMEO COMMUNITY SCHOOLS, PLAINTIFF-APPELLEE,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., DEFENDANTS-APPELLANTS,

and

SUSAN K. GARRARD, DEFENDANT-INTERVENOR-APPELLANT.

Before: WEICK, LIVELY and ENGEL, Circuit Judges

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants, Defendant-Intervenor-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

A TRUE COPY

ATTEST:

JOHN P. HEHMAN

By /s/ Jo Ann McHale
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 6-71438

Filed: April 7, 1977

ROMEO COMMUNITY SCHOOLS,
a Public Body Corporation, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, An Agency of the United States of America, and F. DAVID MATTHEWS, Secretary of United States Department of Health, Education, and Welfare, DEFENDANTS.

MEMORANDUM OPINION

This is an action for declaratory judgment and permanent injunction, brought under 28 U.S.C. § 2201 and the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, by plaintiff Romeo Community Schools (Romeo) against defendant Department of Health, Education, and Welfare (HEW).[1] Plain-

[1] Plaintiff's complaint names both the United States Department of Health, Education, and Welfare and its Secretary F. David Matthews, as party defendants. Since both defendants are, in effect, the same party for the purpose of the instant suit, this opinion will refer to only one defendant, denominated as either "HEW" or "The Secretary," or both.

tiff challenges the authority of defendant to promulgate certain administrative regulations under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, governing sex discrimination in federally funded education programs. Specifically, plaintiff challenges the legality of the regulations contained in 45 C.F.R. Part 86, Subpart E, §§ 86.51, *et seq.*, which purport to regulate sex discrimination in the employment relationship between federally funded public schools and their teacher employees. The case is before the court on cross-motions for summary judgment.[2]

I.

Plaintiff Romeo Community Schools is a Third Class School District duly organized under the laws of the State of Michigan, Romeo operates a public school system in Macomb and Oakland Counties, Michigan, with a total student enrollment currently of 5,092. Romeo currently employs 244 teachers and operates under a budget of fiscal 1976 of $7,210,000.

Plaintiff receives federal funds through the defendant HEW for a number of its educational programs. For the last three years, Romeo has received funds earmarked for pre-school and elementary remedial reading programs under Title I. 20 U.S.C. §§ 241 a-m. Under Title II, Romeo received federal

[2] A hearing was held on these motions February 8, 1977. By agreement of both plaintiff and defendant, a motion to intervene by Ms. Susan K. Garrard, a counselor in the Romeo school system, was granted. The court has had the benefit of excellent briefs and oral arguments from all parties.

funds for the purchase of library books and other learning materials. 20 U.S.C. §§ 821, *et seq.* Romeo participates in a federally funded Vocational Education Program with three other Macomb County School Districts and operates two such programs of its own, all at the secondary level. 20 U.S.C. §§ 1241-1391. Plaintiff has also received funds for the last three years under the National School Lunch Act, 42 U.S.C. §§ 1751, *et seq.*, which provides free milk to disadvantaged students. This federal financial aid to Romeo totaled $45,240 for the 1973-74 school year, $92,351 for the school year 1974-75, and $114,949 for the last school year, 1975-76. Though significant, these figures actually represent only a small fraction of Romeo's total budget—approximately 2% in 1976.

As a recipient of this federal aid, Romeo is subject to Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681, *et seq.*, Section 1681 of the Act prohibits sex discrimination in federally funded education programs:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Under § 1682, the Department of HEW is empowered to investigate reported violations of Title IX and to

initiate administrative proceedings to enforce compliance if voluntary compliance cannot be secured.[3]

[3] § 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Refusals to comply can be sanctioned under § 1682 with a termination of federal aid of those programs affected by the school's discriminatory policies. Section 1682 provides the Secretary's only means of enforcing § 1681.

Under § 1682, the Secretary of HEW is also authorized to promulgate "rules, regulations, or orders of general applicability," to effectuate the provisions of § 1681, and pursuant to this authority, the Secretary has promulgated a comprehensive set of regulations, 45 C.F.R. §§ 86.1, *et seq.*, which governs the conduct of federally assisted schools in a number of specific areas. Subpart E of these regulations, 45 C.F.R. §§ 86.51-86.61, purports to regulate the conduct of Title IX schools toward their teacher employees. Subpart E covers a wide range of employment practices, including recruitment, advertising, and pre-employment inquiries, §§ 86.53, 86.59, 86.60; employment criteria, § 86.52; employee compensation and fringe benefits, §§ 86.54, 86.56; and job classification and structure, § 86.55. These regulations, according to § 86.51, apply to employment practices in all programs operated by federally assisted public schools. The focus of this litigation is 45 C.F.R. § 86.57, which requires all federally assisted schools to treat pregnancy equally with sickness and disability for purposes of leave and compensation benefits:

§ 86.67 Marital or parental status

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee

shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

Romeo is in apparent non-compliance with this regulation. The collective bargaining agreement between Romeo and the Romeo Education Association, the bargaining representative for Romeo's faculty employees, specifically provides that pregnancy and maternity leave shall not be treated equally with sickness and disability leave. Article XX of the union contract provides that pregnancy leave may not be charged against accrued sick leave and is not compensable, either in salary or retirement credits. Furthermore, teachers are required to begin their pregnancy leave by the eighth month of pregnancy, unless they have the permission of their physician allowing them to complete the last two weeks of a marking period, and teachers may not return to work prior to the commencement of the post-natal period or post-natal examination without express medical permission.[4]

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[4] Article XX of Romeo's outstanding collective bargaining agreement provides:

1. "It is understood that pregnancy is not a sickness or injury and is not applicable under the sick leave provisions of this Agreement."
2. "All teachers who become pregnant shall be granted leave of absence. No salary will be received during the time of

On February 4, 1976, a complaint was filed with HEW by Susan K. Garrard, a high school counselor in the Romeo system, alleging sex discrimination in Romeo's pregnancy leave employment policy.[5] An investigation ensued, and on June 9, 1976, HEW's Regional Director for Civil Rights issued a letter to plaintiff citing Romeo for non-compliance with 20

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maternity leave. Schedule increment adjustments, salary and retirement credit are not allowed for such a leave."

3. "All pregnant teachers shall be required to commence the leave of absence no later than the end of the eighth month of pregnancy, unless they have their medical physician's approval which would allow them to complete the last two weeks of a marking period."

4. "No teacher is permitted to return to work until (a) a conclusion of the post-natal period or post-natal examination, (b) without written authorization that the teacher is physically able and capable of performing all duties and functions of the job and does not create an exposure of liability or employment risk. Otherwise, the normal return from a maternity (and child care) leave shall be the commencement of the next marking period or next school year, whichever is administratively applicable."

5. "When the teacher reports to her supervising Principal or Administrator that she is pregnant, she will also file a letter with same Administrator that she holds the school district harmless and without liability in the event she or the unborn fetus shall be injured as a result of working with students in the completion of her duties."

[5] A class action suit, brought as a private cause of action under § 1681, has been initiated against plaintiff Romeo in the Federal District Court for the Western District of Michigan regarding this same pregnancy leave policy. *Darlene Thompson, et al.* v. *Romeo Bd. of Education, et al.*, 12 FEP 1700 (W.D. Mich. 1976). Susan Garrard is a member of the plaintiff class in this suit. The action is currently pending.

C.F.R. § 86.57, and hence non-compliance with Title IX. In response, by letter dated June 24, 1976, plaintiff noted a "serious question" as to HEW's authority under Title IX to regulate the employment practices of federally assisted schools. "It would appear," wrote plaintiff, "that HEW's legislatively conferred authority under this Title would extend only to the persons who are the objects or beneficiaries of federally funded programs, i.e., the students." Plaintiff was given until June 26, 1976 to provide assurances that its practices would be brought into compliance with the regulation. This deadline was later extended to July 9, 1976; on July 9, this suit was commenced.[6]

[6] Initiation of this suit did not abate enforcement proceedings. By letter dated August 31, 1976, Romeo was informed by the Director of HEW's Office for Civil Rights for Region V that, in view of Romeo's unwillingness to voluntarily comply with the regulations in question, the matter had been turned over to HEW's Washington Office for Civil Rights, with a recommendation to initiate enforcement proceedings. On November 12, 1976, the Director of the Washington Office informed Romeo that the matter was being referred to HEW's Office of General Counsel for the initiation of enforcement proceedings. On November 15, 1976, enforcement proceedings were commenced with the filing of an administrative complaint. On December 12, 1976, the Office of Civil Rights directed that final approval on any applications by Romeo for increased aid to current programs or for aid to new programs be deferred pending the outcome of enforcement proceedings.

At a hearing before this court on February 8, 1977, plaintiff made an oral motion for a preliminary injunction to restrain further administrative action by HEW prior to the disposition of its motion for summary judgment. The initial administra-

II.

The court is faced at the outset with a motion to dismiss by the defendant, who challenges plaintiff's complaint on grounds of ripeness, failure to exhaust administrative remedies, and lack of subject matter jurisdiction. Defendant's ripeness argument is bottomed on the fact that administrative enforcement proceedings have not yet been completed in this case. The Administrative Procedures Act only provides for review of "final agency action," 5 U.S.C. § 704, and HEW argues that no such final action has yet been taken here, since none of Romeo's federal funds have yet been terminated. *Board of Education of the City of Cincinnati* v. *Dept. of HEW*, 396 F. Supp. 203, 248-49 (S.D. Ohio 1975). Indeed, there is as yet no final determination of non-compliance with Title IX by the Secretary. As a prerequisite to any judicial review of this matter, defendant contends that such a determination should be made. *Toilet Goods Assoc.* v. *Gardner*, 387 U.S. 158 (1967); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *DuBois* v. *Clark*, 389 U.S. 309 (1967).

HEW also contends that plaintiff is bypassing its administrative remedies by the premature commencement of this suit. *Myers* v. *Bethlehem Shipbuilding*

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tive prehearing conference in this matter was scheduled for the following day, February 9, 1977. This court contacted the presiding Administrative Law Judge, the Honorable Allen E. Gramza, on February 9 and secured his agreement to postpone further administrative action for 45 days, pending the issuance of this opinion.

Corp., 303 U.S. 41, 50-51 (1938). It is defendant's position that the issues raised in plaintiff's complaint should first be addressed to HEW in the context of enforcement proceedings, so that HEW can utilize its expertise in this field to make an initial ruling on plaintiff's claims. *Best* v. *Humbolt Placer Mining Co.*, 371 U.S. 334, 338 (1963); *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 353 (1963). At the very least, defendant argues that a thorough factual record should be made at the administrative level, so that HEW's authority to regulate employment practices under Title IX and plaintiff's legal challenges to that authority are clearly focused. *Aircraft and Diesel Equip. Corp.* v. *Hirsh*, 31 U.S. 752, 767-768 (1947).

HEW further contends that this court would not have jurisdiction over plaintiff's suit even after a final decision to cut off Romeo's federal financial assistance under Title IX. According to defendant, plaintiff is already entitled under § 1683 to review by the United States Court of Appeals for the Sixth Circuit of any final action by HEW terminating financial aid.[7] Defendant contends that this explicit

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[7] 20 U.S.C. § 1683 states in pertinent part:

> "Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds."

Section 1683 thus incorporates any judicial review provisions otherwise established by Congress for reviewing decisions of HEW terminating federal aid to education. Specifically, Title

statutorily-created review procedure is exclusive and precludes this court from entertaining plaintiff's action under the Administrative Procedures Act at any time. *DuBois* v. *Clark, supra; Lance Roofing Co.* v. *Hodgson*, 343 F. Supp. 685 (N.D. Ga. 1972).

These contentions are not persuasive. Section 1682 authorizes HEW to promulgate "rules, regulations, or orders of general applicability" to effectuate the purposes of Title IX. "Agency action," for the purposes of the Administrative Procedures Act, expressly includes "the whole or a part of an agency rule," and "rule" is separately defined by the Act as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. 551(4). The regulations here in question have the force of law; they are in final, approved form and currently in full effect. Their promulgation is therefore "final agency action" reviewable under the A.P.A.

The validity of federal agency regulations may, under certain circumstances, be judicially tested prior to their enforcement. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) forcefully upholds

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I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241, *et seq.*, and 821, *et seq.*, through which Romeo receives the bulk of its federal assistance, permit review of aid termination decisions by the United States Court of Appeals for the circuit in which the affected school district is located. 20 U.S.C. §§ 241(k), 827. It is defendant's position that this right of review is available to plaintiff under the incorporating language of § 1683.

pre-enforcement actions of this nature. In that case, the Commissioner of Food and Drugs had issued regulations under the 1962 Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, *et seq.*, requiring that all labels and advertisements for prescriptions drugs carry both the drug's proprietary name and its "established" name, as designated by the Secretary of HEW. A group of drug manufacturers brought suit to have these regulations declared invalid prior to the effective date of their enactment on the ground that the Commissioner had exceeded his statutory authority in promulgating them. The Supreme Court held that a district court could properly entertain such pre-enforcement action under the Administrative Procedures Act and the Declaratory Judgment Act, 28 U.S.C. § 2201.

In reaching this decision, the Court stated that access to judicial review should only be restricted upon "clear and convincing evidence" that such was the legislative intent. *Abbott Laboratories* v. *Gardner, supra*, p. 141, quoting *Rusk* v. *Cort*, 369 U.S. 367, 379-380 (1962). The court found that the special review provisions established under the Food, Drug, and Cosmetic Act did not preclude pre-enforcement review. In concluding that the controversy in *Abbott Laboratories* was ripe for judicial resolution, the Court cited and discussed several factors, including the "purely legal" nature of the issues involved and the direct, immediate and adverse impact of the regulations upon petitioners, who would have been automatically liable for both civil and criminal pen-

alties for non-compliance once the regulations became effective. It noted the significant burden which compliance would have imposed on petitioners' business operations as a further consideration which militated for pre-enforcement review, and the lack of any evidence to show that the suit was brought for the purpose of delaying or impeding administrative enforcement of the regulations in question.

All of these factors are present in this case. HEW has already acted under the disputed regulations to postpone any final approval of applications by Romeo for funding of new programs or for significant increases in the funding of existing programs. Though the amount of this financial assistance may be relatively small, the court credits the affidavit of Robert Reid, Superintendent of Romeo Community Schools, in which he states that HEW's action has nevertheless adversely affected Romeo in its budgeting and planning responsibilities. *See Continental Air Lines, Inc.* v. *C.A.B.*, 522 F.2d 107, 126 (D.C. Cir. 1975); *Textile and Apparel Group, Am. Imp. Assoc.* v. *F.T.C.*, 410 F.2d 1052, 1054, *cert. denied*, 396 U.S. 910 (D.C. Cir. 1969). Plaintiff also contends that defendant's steps toward regulatory enforcement have undermined public confidence in plaintiff, and this may well be so. *See A. O. Smith Corp.* v. *F.T.C.*, 530 F.2d 515, 524 (3rd Cir. 1976). Thus, while the regulations here in question do not carry the kind of automatic civil and criminal penalties involved in *Abbott Laboratories*, their impact upon plaintiff has nevertheless been made direct, immediate, and adverse by defendant's pre-enforcement conduct.

In order to comply with the disputed regulations, Romeo would be forced to modify the existing collective bargaining agreement between Romeo and its teacher employees, and a new policy regarding pregnancy and maternity leave would have to be implemented. All employees who are not allowed to use accrued sick leave time for pregnancy-related leave since June of 1972 would have to be reimbursed for salary and schedule increments lost as a result of Romeo's existing policies, and salary and retirement credits of these employees would have to be adjusted as well. Clearly, compliance with HEW's regulations would require an immediate and significant change in the conduct of plaintiff's affairs. *Abbott Laboratories* v. *Gardner*, *supra*, p. 152; *A. O. Smith Corp.* v. *F.T.C.*, *supra*.

It is not apparent how defendant's administrative enforcement proceedings could materially advance the resolution of this dispute. The only issue raised by plaintiff's complaint is defendant's authority under Title IX to promulgate the regulations contained in Subpart E of 45 C.F.R. §§ 86.1, *et seq.* Romeo freely concedes non-compliance with these regulations, and the evidence supporting this concession seems clear enough. Under these circumstances, there does not appear to be any factual issue for which an extensive administrative record need be compiled. *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958); *Troy* v. *Shell Oil Co.*, 378 F. Supp. 1042, 1044-1045 (E.D. Mich. 1974).

Romeo's challenge to HEW's authority in this case is purely legal.

Nor are any administrative remedies foreclosed by Romeo's refusal to preliminarily exhaust compliance proceedings. As noted, plaintiff's complaint raises the legal issue of HEW's statutory authority to issue the regulations in question; enforcement proceedings, however, are concerned primarily, if not solely, with the factual issue of compliance. Moreover, there is no question that HEW fully regards the disputed regulations as valid; HEW would not be enforcing them if it did not. HEW cannot claim primary jurisdiction over a legal dispute for which it can provide no meaningful forum. *Seepe* v. *Dept. of Navy*, 518 F.2d 760, 762 (6th Cir. 1975); *Weinberger* v. *Salfi, supra*, 764-765; *F.T.C.* v. *Markin*, 532 F.2d 541 (6th Cir. 1976); *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *Jewel Companies, Inc.* v. *F.T.C.*, 432 F.2d 1155, 1159 (7th Cir. 1970).

This controversy is ripe for judicial resolution, and plaintiff, under the circumstances, need not await review by the United States Court of Appeals. Even if the Court of Appeals has jurisdiction under the reviewing statutes cited by defendant to adjudicate the issues raised in this case, such jurisdiction would not be exclusive. Here, as in *Abbott Laboratories*, the legislative scheme explicitly contemplates a cause of action under the A.P.A. for redress of unlawful

agency action "not otherwise subject to judicial review." 20 U.S.C. § 1683.[8]

Plaintiff has made out a valid case for pre-enforcement relief, and defendant's motion to dismiss must accordingly be denied. There is nothing to be gained by requiring plaintiff to exhaust administrative remedies which do not exist or to await uncertain future opportunities for legal redress before the Court of Appeals. If these regulations are invalid, plaintiff is entitled to know that now.

III.

The issue of HEW's authority to promulgate regulations governing employment relations under Title IX is essentially one of statutory construction. Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 d)—d)5), which prohibits race discrimination in all federally funded programs. Most of the provisions of Title IX are virtual carbon copies of parallel provisions in Title VI; indeed, Title IX was originally contemplated as

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[8] Section 1683 provides in pertinent part:

> In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.

a simple amendment to Title VI adding sex discrimination in federally assisted education programs to the general prohibitory language of § 2000 d).[9] Both Title IX and Title VI contain similar provisions regarding investigation and enforcement, the imposition of sanctions, the promulgation of regulations by HEW, and judicial review.[10]

There is, however, one important difference between these two statutes: Title VI contains a provision specifically excluding discrimination in employment from its coverage:

> § 2000 d)3)
>
> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Title IX contains no parallel provision.

This fact, in defendant's view, is clear proof that Congress did not mean to limit the scope of Title IX to exclude coverage of sex discrimination in employment. Defendant argues that a "commonsense"

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[9] H.R. 16098, § 805(a), 91st Cong., 1st Sess. (1969). It appears that the original drafts of Title IX were "marked up" xeroxed copies of Title VI. See *Minutes of the House Committee of Education and Labor*, (Sept. 30, 1971).

[10] Compare 20 U.S.C. §§ 1681, 1682, and 1683 with 42 U.S.C. §§ 2000 d), 2000 d)1), and 2000 d)2).

reading of § 1681, standing alone, shows that teachers fall within the class of individuals protected by this provision, since the statute provides that "no person" shall be subjected to discrimination, and the term "person" includes both students and teachers.[11] Thus, HEW construes its legislative mandate as authorizing direct regulation of sex discrimination in employment by federally funded schools; it is HEW's position that such discrimination is itself grounds for terminating a school's federal aid, without regard to whether students are affected by the school's employment policies.

Defendant also relies on the legislative history of Title IX to show a congressional intent to regulate employment practices under § 1681. Senator Birch Bayh, the Senate sponsor of Title IX, made these remarks during introduction of the bill:

> "Amendment 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and *employment* resulting from those programs. . . . More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admission procedures, scholarships, and *faculty employment*, with limited exceptions."

[118 Cong. Rec. ¶ 2745 (daily ed., February 28, 1972) emphasis supplied]

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[11] Brief in Support of Defendant's Motion to Dismiss, or, In the Alternative, For Summary Judgment, p. 15.

Moreover, Congress reviewed the Title IX regulations in July, 1975, under 20 U.S.C. § 1232 (d), and declined to disapprove them. From the hearings held regarding these regulations, it is clear that HEW's authority to regulate employment practices under Title IX was specifically discussed and considered. Again, Senator Bayh:

> "[T]he heart of these guidelines is the prohibition of the thwarting of equal opportunity for female students and teachers at any educational level."

These views were shared by Representative Patsy Mink:

> "[T]he legislative history of Title IX indicates that employment was indeed covered by the broad mandate of the law for nondiscrimination on the basis of sex. The original House bill included an exemption for employment patterned after the exemption in Title VI of the Civil Rights Act. The Senate version contained no such exemption, indicating that employment was covered. In conference, the language of the Senate version was adopted."

Hearings, *supra*, p. 164.

The Secretary further argues that his own interpretation of Title IX's scope is entitled to great weight as an official and contemporaneous interpretation by the enforcing agency. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971) *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

The absence of an explicit provision in Title IX, similar to § 604 of Title VI, 42 U.S.C. § 2000d)2), excluding employment discrimination from its coverage does not show a congressional intent to make Title IX broader than Title VI in this respect. Rather, this discrepancy must be traced to the fact that Title IX was enacted as part of a larger legislative program which also included an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 e), *et seq.*, enlarging the scope of *that* provision to include sex discrimination in employment, as well as an amendment to the Equal Pay Act, giving the Secretary of Labor authority to regulate sex discrimination in educational employee compensation. 29 U.S.C. § 206 d).[12] A provision similar to § 604 was left out of this package in order to avoid the inherent contradiction between such a provision and these Amendments.

HEW's arguments based on the legislative history of Title IX are not compelling. Senator Bayh's quoted assertion of employment discrimination coverage by Title IX in his remarks during introduction of this bill was made in reference to the entire Title IX legislative package, including the Title VII and Equal Pay Act amendments. The legislative history of the regulations themselves is entitled to little if any weight in determining the

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[12] The provision of Title IX which amended Title VII passed both Houses of Congress and the conference committee, but was deleted prior to enrollment as public law, due to the fact that a similar amendment had already been enacted as part of another bill.

scope of § 1681. These regulations were reviewed some three years after the enactment of Title IX and by a different Congress. Nor is the congressional failure to disapprove the regulations any indication of their validity. 20 U.S.C. § 1232 expressly provides that the failure of Congress to disapprove regulations promulgated by HEW is not evidence of approval and creates no presumption of validity.[13]

Plaintiff has mustered its own presentation of Title IX's legislative history to support an alternative construction of its coverage. Plaintiff points out that § 601 of Title VI, 42 U.S.C. § 2000 d), upon which § 1681 of Title IX is based, was never considered by Congress as covering race discrimination in employment, even standing by itself. The exclusionary language of § 604, 42 U.S.C. § 2000 d)2), which finds no counterpart in Title IX, was only included in Title VI as an afterthought, to make this point clear and to resolve any ambiguity in the langa-

[13] 20 U.S.C. § 1232 d)1) provides in part:

> Failure of the Congress to adopt such a concurrent resolution with respect to any such final regulation prescribed under any such Act, shall not represent, with respect to such final regulation, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.

age of § 6014.[14] Plaintiff also notes that Title IX contained a provision identical to § 604, denominated § 904, throughout its passage. It was only in committee conference just prior to final passage, that the provision was deleted.[15] This indicates, in plaintiff's view, that Congress considered § 904 a needless restatement of § 901's limited coverage.

Plaintiff also notes that during the hearings held on Title IX before the House Special Subcommittee on Education, not one witness who testified about Title IX's employment discrimination coverage did so with reference to § 901. Rather, all such testimony was directed toward those provisions of Title IX which amended Title VII and the Equal Pay Act to include employment discrimination in education within their purview.[16] The court, however, will not pursue plain-

[14] Senator Humphrey, the floor leader of Title VI, stated in reference to § 604 that the provision merely "made a number of points clearer and more specific. We have expressed in specific legislative language what has always been intended." 110 Cong. Rec. 12707 (1964).

[15] The report of the committee conference is cryptic in its reference to this deletion:

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

1972 U.S. Code Cong. & Admin. News, Vol. 2, pp. 2671-2672.

[16] *Hearings on Section 805 of H.R. 16098 Before the Special Subcommittee on Education on the House Committee on*

tiff's analysis of the legislative history of this Act further, for there is a much more obvious and relevant source for determining the scope of Title IX and that is Title IX itself.

IV.

The analysis begins with the prohibitory language of § 1681:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . .

Though cast in broad terms, § 1681 nevertheless addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs. Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to faculty employees, the language of § 1681 is indirect, if not obscure. Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are "subjected to discrimination *under*" these programs,

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Education and Labor, 91st Cong., 2nd Sess. (1970), 8-9, 27, 79, 128, 159, 304-306, 379.

(emphasis added), only to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face. When Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this.[17]

HEW's "commonsense" interpretation of § 1681 notwithstanding, the court is constrained to read this language as a prohibition on sex discrimination against students and only students. The beneficiaries of Romeo's Title I remedial reading programs are the schoolchildren in those programs. The participants in Romeo's vocational education programs are the students learning new vocations through them. The beneficiaries of Romeo's School Lunch program are the disadvantaged children who receive free milk as a result of this federal assistance. Section 1681 was written in broad terms not to cover all forms of sex discrimination in education, but only to cover the wide variety of education programs funded by the federal government and the many ways in which sex discrimination against students in those programs can be manifested.

This construction of § 1681 is borne out by the series of coverage exclusions provided in § 1681 it-

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[17] See, for example, 42 U.S.C. §§ 2000 e), *et seq.*; 29 U.S.C. § 206 d).

self, all of which relate to student activity or enrollment. Thus, § 1681(a)(1) excludes coverage of admissions to vocational and higher educational institutions; (a)(2) excludes coverage of admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy; (a)(4) excludes coverage of military academies; (a)(5) excludes coverage of admissions to educational institutions which have traditionally admitted members of only one sex; (2)(6)(A) excludes coverage of the membership practices of fraternities and sororities; (a)(6)(B) excludes coverage of the membership practices of the YMCA, YWCA, the Boy Scouts, Campfire Girls, and other youth service organizations which have traditionally limited their membership to one sex. Not one of these exclusions concerns a federally assisted educational institution's employment practices, and this can be explained in only one of two ways: either Congress meant to allow wide-open coverage of employment practices under § 1681 while closely regulating § 1681 coverage in all other respects, or, and what appears more likely, Congress never meant to include employment practices within the coverage of § 1681 in the first place.

This construction of § 1681 is further supported by an analysis of § 1682, which defines HEW's enforcement power under the Act. As noted previously, the only sanction permitted under § 1682 is a termination of federal funds to the noncomplying institution. This aid termination provision, quite obviously

is of limited enforcement value. Imposition of this sanction will not necessarily compel a delinquent school system to modify or eliminate its discriminatory practices, but will necessarily penalize the students involved or enrolled in the affected programs. In a situation where the students themselves are the victims of sex discrimination, it is reasonable to assume that Congress balanced the costs and benefits involved and determined that any benefit which students might derive from the education programs financed by HEW was more than outweighed by the sex discrimination in those programs. A termination of federal aid under these circumstances has obvious justification.

However, in a situation where a federally assisted school system discriminates against its teacher employees, the § 1682 sanction has very limited justification. Termination of federal aid will have no more enforcement value in such a case, and the students participating in affected programs will still be the ones to suffer from the aid termination sanction, even though the sanction will not be imposed for the purpose of enforcing their rights. The court doubts that Congress would resort to such an arbitrary enforcement measure where alternative methods of prohibiting employment discrimination, more effective and less costly than this, are readily available.

There is a further limitation on HEW's enforcement powers under § 1682 which is relevant here. HEW's authority to terminate federal funds for noncompliance with § 1682 is "limited in its effect on the

particular program, or part thereof, in which such non-compliance has been found." This limiting language makes the sanction provided by § 1682 "program specific." HEW is prohibited from terminating financial assistance to some programs in a school's curriculum simply because other programs are not in compliance with § 1681. Thus, HEW must determine the appropriateness of aid termination under § 1682 on a program-by-program basis.

This limitation on HEW's enforcement power is implicitly a limitation on HEW's authority to regulate as well. HEW cannot regulate the practices of an educational institution unless those practices result in sex discrimination against the beneficiaries of some federally assisted education program operated by the institution. The focus of § 1631—elimination of sex discrimination in federally funded education programs—must be the focus of HEW's regulations under § 1682 as well. To this extent, HEW's regulatory power is also "program specific."

Regulation of employment practices, however, is inherently non-"program specific." An educational institution's employment policies are general in nature, covering, by and large, all faculty employees involved in all of an institution's education programs, whether federally funded or not. Regulation of those policies by HEW will therefore necessarily entail the regulation of employment practices unrelated to the particular programs funded by the federal government and without regard to whether such practices result in sex discrimination against the beneficiaries

of these programs. Compliance with HEW's regulations under subpart E will inevitably require modifications of employment policies which apply generally to all faculty employees and education programs throughout the system. Yet the federal interest involved here, as defined by the scope of §§ 1681 and 1682, is much narrower and does not appear to justify this kind of regulatory leverage. In Romeo's case, for example, only one out of every ten education programs receives federal financial assistance; less than 5% of Romeo's faculty employees are involved in any federally financed programs.

The necessarily comprehensive nature of HEW's employment regulations is borne out by the regulations here in dispute. Section 86.51 makes clear that Subpart E of Part 86, 45 C.F.R. §§ 86.51, *et seq.*, covers all employment practices in all programs of federally financed schools:

> § 86.51 Employment.
>
> (a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.
>
> (2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way

which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

This coverage is patently overbroad. HEW could not enforce its regulations as to employment practices in Romeo's non-federally funded education programs except by terminating aid to those programs which are federally funded, and this would constitute a clear violation of the programatically specific limitation on HEW's enforcement powers contained in § 1682.[18]

An even more persuasive indication that Congress did not intend to regulate employment practices under § 1681 is the fact that Congress specifically provided for such regulation under both Title VII and the Equal Pay Act elsewhere in the very same legislation. Under these amending provisions, both the EEOC and the Secretary of Labor are now empowered to investigate and bring suit to correct any alleged sex discrimination in educational employment. These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority. Even under HEW's own interpretation of its powers, a failure or refusal to comply with its regulation on employment discrimination can only be sanctioned with a termination of federal funds to the delinquent educational institution. While Congress does, as defendant points out, tend to widely delegate regulatory authority in the field of civil rights, it is difficult to believe that Congress felt any real need under Title IX to delegate to HEW such marginal regulatory authority as an addition to that already clearly and adequately established in two other federal regulatory agencies.

For all of these reasons, the court holds that HEW's regulations purporting to govern employment discrimination in federally funded educational institutions are not in furtherance of the legislative purpose of § 1681, and are therefore not authorized by § 1682. In view of the legislative history of the Act, the specific prohibitory language of § 1681 itself, the series of exclusions to its coverage all of which relate to non-employment practices, the limitation of § 1682's enforcement sanctions to a termination of federal financial aid, the further limitation of this termination power to the particular federally financed programs affected, and the provision in other parts of the same legislative package for regulation of sex discrimination in employment by both the EEOC and

[18] HEW contends that the term "program or activity" as used in § 1681 refers to the entire operation of the recipient educational institute. Brief in Support of Defendant's Motion to Dismiss or, In the Alternative, For Summary Judgment, p. 23. Hence, HEW argues that it may regulate employment practices through school district's entire system. This novel and protean interpretation of a well-established statutory term was thoroughly refused in *Board of Public Instruction of Taylor Co.* v. *Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969).

the Department of Labor, the court is persuaded that § 1681 must be interpreted as a prohibition only on sex discrimination by federally funded educational institutions against their students.

V.

Finally, defendant raises an "infection" theory, by which it claims the authority under Title IX to regulate sex discrimination against teachers to the extent that such discrimination may "infect" a school system's federally funded education programs and so constitute sex discrimination against students in those programs. This argument finds its source in a discussion, largely dicta, by the United States Court of Appeals for the Fifth Circuit in the case of *Bd. of Education of Taylor Co.* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969). *Taylor Co.* was actually a Title VI case involving a decision by HEW to terminate federal aid to all of plaintiff's education programs due to a determination of non-compliance with Title VI in some of them. The Court of Appeals for the Fifth Circuit ruled this agency action illegal, holding that Title VI's program-specific aid termination sanction prevents HEW from condemning programs by association. The court then discussed potential situations in which discrimination in one education program could provide a basis for terminating aid in another, or in which some form systemic, non-programatic discrimination could infect a particular federally funded education program and render it discriminatory in effect or operation:

> We note finally that the purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of federal funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper.

Bd. of Education of Taylor Co. v. *Finch, supra*, p. 1078.

HEW argues that this recognized potential for discrimination against students as a result of discrimination against their teachers provides sufficient justification for the regulation of employment practices under § 1681. HEW contends that where it can establish such a relationship between faculty discrimination and student discrimination in a federally funded education program, it is justified in enforcing the employment regulations in Subpart E as necessary.

There was a good deal of discussion at oral argument regarding this "infection" theory; it was treated extensively in the briefs. Whatever its validity or significance, however, the possibility of such a discriminatory infection does not authorize HEW to regulate employment practices for their own sake, and that quite clearly is what HEW purports to do through Subpart E of its Title IX regulations. There is no provision in any of these regulations which specifies that the particular employment practice regulated must result in substantial sex discrimination against students in federally financed education

programs, nor does it appear that HEW considers itself under any obligation to establish such resultant student discrimination before the requirements of Subpart E may be enforced.[19]

This deficiency is fatal to defendant's "infection" argument, for the regulations must be judged as written. This court has neither the power nor the inclination to rewrite these regulations by construing their coverage of employment practices as reaching only situations where sex discrimination against students in affected programs has resulted. Defendant's Subpart E regulations are plainly focused on employment practices *per se*. To judicially engraft onto each of them an implicit requirement of infection would not merely provide a saving limitation on their coverage, it would substantially alter their meaning and effect.

Defendant's infection theory provides no basis in any event for legitimating its regulation of employment practices under Title IX. Even if HEW could establish, for example, that Romeo's pregnancy leave employment policies had infected one or more of Romeo's federally assisted programs so as to cause sex discrimination against students in those programs, HEW would still have no power to regulate Romeo's pregnancy leave policies directly. Section 1681 is concerned solely and simply with sex discrimination against students, and regulations promulgated in furtherance of § 1681 must have a similar focus.

[19] HEW has alleged "infection" at one point in its complaint against Romeo.

To allow HEW to use its authority under § 1682 to regulate employment practices under the guise of regulating sex discrimination against students would extend its authority beyond the clear purposes of § 1681. The marginal enforcement value of such a regulatory scheme and the obvious potential for bureaucratic overreaching persuade this court that HEW cannot directly regulate employment practices under Title IX even where resultant student discrimination is present. The legislative intention was plainly otherwise.

VI.

Judgment will be entered declaring the regulations contained in Subpart E, 45 C.F.R. §§ 86.51, *et seq.* invalid and of no legal force and effect. An appropriate order may be submitted.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

DATE: April 7, 1977,
Detroit, Michigan.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 6-71438

ROMEO COMMUNITY SCHOOLS,
a Public Body Corporation, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, An agency of the United States of America, ET AL., DEFENDANTS.

ORDER

At a session of said Court held in the Federal Building, Detroit, Michigan, on May 18, 1977.

PRESENT: HONORABLE JOHN FEIKENS
United States District Judge

In accordance with the Memorandum Opinion filed April 7, 1977,

IT IS ORDERED that the regulation contained in 45 C.F.R. § 86.57 be and the same hereby is declared invalid and of no legal force and effect.

/s/ John Feikens
United States District Judge
A TRUE COPY
HENRY R. HANSSEN
Clerk

By /s/ Gregg A. Greschak
Deputy Clerk

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-442

UNITED STATES DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE, et al.,
Petitioners,
v
ROMEO COMMUNITY SCHOOLS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Index of Authorities ii

Question Presented 1

Argument 2

I.

There Is No Sufficient Reason for a Writ of Certiorari to Be Granted in the Instant Matter 2

II.

Title IX of the Education Amendments of 1972 Confers No Authority on the Department of Health, Education and Welfare to Regulate General Employment Practices 3

A. Title IX protects participants, beneficiaries, and/or recipients (i.e., students) and not employees 3

B. The legislative history demonstrates that Title IX does not reach employment practices 5

C. Interpreting Section 901 as applying to employment is inconsistent with the programatically specific scope of that Section as well as with the enforcement provisions of Section 902 13

D. Section 902: The "Pinpoint Termination" provision confirms the programatically specific scope of Section 901 16

Page

E. HEW's employment regulations are inherently non-program specific and overbroad: HEW's so-called infection theory is invalid. 18

Conclusion 20

INDEX OF AUTHORITIES

Cases:

Board of Public Instruction of Taylor County, Florida v Finch, 414 F2d 1068 (5th Cir 1969) ... 17

Gatreaux v Romney, 457 F2d 124 (7th Cir 1972) .. 17

Harris v Islesboro School Committee, petition for cert filed, 48 U.S.L.W. 3118 (U.S. Aug. 6, 1979) (No. 79-200) 2,3,5,11,18

Harris v Junior College District of St. Louis, petition for cert filed, 48 U.S.L.W. 3118 (U.S. Aug. 6, 1979) (No. 79-201) 18

Mayor and City Council of Baltimore v Matthews, 562 F2d 914 (4th Cir 1977) 17

Statutes:

42 U.S.C. § 2000d (1970) 6

42 U.S.C. § 2000d-3 (1970) 8

Education Amendments of 1972, §§ 901 and 902 [20 U.S.C. §§ 1681, 1682] 1,3

Education Amendments of 1978, 20 U.S.C. §§ 2701 and 2734 13

Page

Equal Pay Act of 1973, 29 U.S.C. § 213 10,11

Vocational Education Act of 1963, 20 U.S.C. § 2301(1) and (2) 14

Administrative Proceedings:

45 C.F.R. § 86.51-86.61 2

Legislative Proceedings:

110 CONG. REC. (1964)
1602 8

1613 14

10076 7

12707 8

117 CONG. REC. (1971), 30156 14

118 CONG. REC. (1972), 5808 12

H.R. 405, 88th Cong., 1st Sess. (1963) 6

H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963) . 6

Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (1970) 9,15

Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. at 327-28, 331, 335 (1963) 7,14

Hearings on H.R. 1752 Before the House Comm. on Rules, 88th Cong., 2d Sess. at 198 (1964) ... 7

H.R. 5191, 92d Cong., 1st Sess., § 1001(a) (1971) . 15

H.R. 7152, 88th Cong., 1st Sess. (1963) 6

Page

H.R. 16098; 91st Cong., 1st Sess., § 805(a), §§ 901-903 (1969) 6

Minutes of the House Committee of Education and Labor (Sept. 30, 1971) 9

Other References:

Sutherland, *Statutes and Statutory Construction*, § 47.28 13

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Petitioners,
v
ROMEO COMMUNITY SCHOOLS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the Department of Health, Education and Welfare has exceeded the authority granted to it by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, and in particular, by Sections 901 and 902 of that Title, 20 U.S.C. §§ 1681-82, by promulgating as a final regulation Subpart E of 45 C.F.R. § 86 which

purports to regulate the general employment practices affecting all employees of school districts which operate federally-assisted education program.

ARGUMENT

I.

THERE IS NO SUFFICIENT REASON FOR A WRIT OF CERTIORARI TO BE GRANTED IN THE INSTANT MATTER.

In his Petition, the Solicitor General, on behalf of the Petitioner, United States Department of Health, Education and Welfare, et al. (HEW), states that the reason for granting the Petition is as set forth in the Petition for Writ of Certiorari in *Harris* v *Islesboro School Committee, petition for cert. filed*, 48 U.S.L.W. 3118 (U.S. Aug. 6, 1979) (No. 79-200) (hereinafter *Islesboro*).

The standards governing review on certiorari as set forth in U.S. Supreme Court Rules, Rule 19, demonstrate that there is no sufficient reason for the Supreme Court to give consideration to HEW's Petition in the instant matter. The decisions by the courts of appeal that have decided the issue are not in conflict and the federal district courts that have ruled are similarly in total harmony. In addition, none of the other bases for review set forth in Rule 19(b) have been alleged by HEW.

In essence, HEW grounds its petition for review on the fact that it has been unable to bring to fruition the 507 employment complaints it has received, because the federal judiciary has ruled that it (HEW) is without legal authority to investigate and/or handle claims of

employment discrimination. On page 12 of its Petition in *Harris* v *Islesboro, Supra,* HEW states:

> "Because of the severe disruption in the administrative enforcement of Title IX caused by the decision below and others like it, we submit that review by this Court is warranted now despite the absence of a circuit conflict."

It is respectfully submitted that such a cavalier statement in the face of the overwhelming and unanimous judicial authority is not sufficient to invoke the jurisdiction of the Supreme Court. At least three courts of appeal and nine district courts have ruled against HEW's regulations governing employment, holding that Title IX does not grant HEW jurisdiction or authority to regulate the employment practices of educational institutions.

II.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 CONFERS NO AUTHORITY ON THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE TO REGULATE GENERAL EMPLOYMENT PRACTICES.

A. Title IX Protects Participants, Beneficiaries, and/or Recipients (i.e., Students) and Not Employees.

On June 23, 1972, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, was enacted into law. Section 901, which contains Title IX's basic prohibition against sex discrimination in

federally-assisted education programs, provides, in essence, that no person shall, on the basis of sex:

- be excluded from participation in any education program or activity receiving federal financial assistance;
- be denied the benefits of any education program or activity receiving federal financial assistance; or
- be subjected to discrimination under any education program or activity receiving federal financial assistance.

Section 902 of Title IX vests HEW with the power to enforce Section 901 through two principal means:

- the promulgation of rules and regulations to implement section 901 with respect to programs receiving federal financial assistance; and
- enforcement actions which may result in the termination of federal assistance to recipient institutions that fail to comply with the rules or regulations issued pursuant to that section.

Section 903 provides for judicial review of "any department or agency action" taken pursuant to Section 902.

It is submitted that Section 901 is clear and unambiguous and that the courts below correctly determined that the prohibition contained in Section 901 covers only the participants, beneficiaries, and/or recipients (hereinafter "beneficiaries") of federally-assisted programs, i.e., students, and does not, as

HEW contends, extend to employees. Unless the employee is a direct beneficiary of a federally-assisted program, he/she is not a "person" within the meaning of Section 901. The term "person" set forth at the beginning of Section 901 is specifically modified by and limited to those persons who are beneficiaries of education programs or activities receiving federal funds. Thus, Section 901 clearly limits HEW's jurisdiction to these specific persons, and general employment regulations are beyond the scope of this restricted delegation of authority. In enacting this precise language, Congress did not subject an educational institution's entire employment policies or practices to HEW scrutiny, and did not intend, for example, that unequal pay among male and female lawncutters is to be regulated by HEW with the eventuality of termination of federal funds for federally-assisted educational programs. While a lawncutter is a person, he/she is not a person in a federally-assisted program or activity or a beneficiary thereof.

Therefore, HEW's regulations, to the extent that they are directed to employment, are in excess of the authority given to HEW by Congress and in conflict with the clear and unambiguous provisions of Section 901.

B. The Legislative History Demonstrates That Title IX Does Not Reach Employment Practices.

In its Petition in *Islesboro, supra*, HEW attempts to point to Congressional history as authority for its position. In fact, a review of the entire legislative history demonstrates that Title IX was never intended to cover employment conditions.

Title VI of the Civil Rights Act of 1964[1] prohibits race discrimination in federally-assisted programs. A review of Section 601 of Title VI and Section 901 of Title IX reveals them to be virtually identical. The legislative history indicates that Title IX was, in fact, patterned after Title VI. It is essential, therefore, to review relevant portions of the legislative history of Title VI.

The original version of the bill which became Section 601 of Title VI, contained language prohibiting employment discrimination in connection with federally-assisted programs.[2] An early revision, however, resulted in the deletion of the employment language from Title VI and its subsequent inclusion in an expanded and strengthened new Title VII, the latter title incorporating the provisions of the equal employment opportunity legislation that had been previously reported by the House Committee on Education and Labor.[3]

The modified version of Title VI afforded protection only to the "beneficiaries" of federal programs and did

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[1] 42 U.S.C. § 2000d. Sections 602 and 603 of Title VI are basically identical to Sections 902 and 903 of Title IX; Section 601 is identical with the exception that it prohibits discrimination based on "race, color or national origin" whereas Section 901 prohibits only discrimination based on sex.

The first House version of Title IX provided for a simple amendment to Title VI that would have included the word "sex" after the words "race, color." H.R. 16098, § 805(a), 91st Cong., 1st Sess. (1969). In the version that was finally enacted, the provisions most relevant to this lawsuit, i.e., Sections 901-903, were xeroxed copies of the parallel provisions of Title VI. See Minutes of the House Committee on Education and Labor showing "marked up" xeroxed copy of Title VI, pp. 9-10, September 30, 1971.

[2] H.R. 7152, 88th Cong., 1st Sess. (1963).

[3] H.R. 405, 88th Cong., 1st Sess. (1963); H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963).

not extend to those employed in connection with such programs. All provisions relating to employment were contained in the expanded Title VII, a fact frequently noted in the course of the hearings on the bill.[4] During hearings before the House Rules Committee, for example, Chairman Celler, the House sponsor of the bill, was asked whether Title VI would apply to discrimination against an applicant for employment in connection with a federally-assisted program. His reply was that such discrimination "has nothing to do with Title VI. That would come under FEPC."[5]

That Title VI was intended to protect the beneficiaries of federal programs, and was not intended to cover those employed to provide the benefits under that title, was also the expressed understanding of the Justice Department. In a letter to Senator Cooper, Attorney General Kennedy responded to a specific question on this point:

> 3. *Question*. Would section 602 cover an employer who receives funds under a Federal program, and who discriminates in his employment practices?
>
> *Answer*. Generally no. Title VI is limited in application to instances of discrimination against the beneficiaries of Federal assistance programs, as the language of section 601 clearly indicates.[6]

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[4] See, e.g., *Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. at 327-328, 331, 335 (1963) [hereinafter cited as *Senate Judiciary Committee Hearings*].

[5] *Hearings on H.R. 1752 Before the House Comm. on Rules*, 88th Cong., 2d Sess. at 198 (1964).

[6] 110 CONG. REC. 10076 (1964).

The fact that Title VI would not extend to employment practices, except in those programs which were intended to create employment (i.e., where the employees would themselves be the beneficiaries), was emphasized repeatedly. Title VII, not Title VI, was the vehicle intended to prohibit discriminatory employment practices. During House debate, it was noted that not even a violation of Title VII would have any bearing on payments covered by Title VI.[7]

To avoid any possible confusion as to whether the breadth of Section 601 of Title VI was intended to include employees as well as beneficiaries, a revision which was ultimately enacted included the addition of the following new section:

> [Sec. 604] Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the federal financial assistance is to provide employment.[8]

In discussing this section, Senator Humphrey, the Senate floor leader for the bill, explained that the revisions "made a number of points clearer and more specific. [W]e have expressed in specific legislative language what has always been intended."[9] As noted by the floor leader, Section 604 was intended simply to

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[7] *Id.* at 1602 (remarks of Congressman Mathias).

[8] 42 U.S.C. § 2000d-3 (1970).

[9] 110 CONG. REC. 12707 (1964) (remarks of Senator Humphrey).

reiterate what Section 601 already provided. It was in no way intended to alter the meaning thereof. Thus, the term "no person" which appears in Section 601 of Title VI, the identical term that was used in Section 901 of Title IX, was never intended to encompass persons employed in federally-assisted programs.

As set forth above, the legislative history of Title VI is clear that Congress created Title VII, not Title VI, to deal with racially discriminatory employment practices. The legislation that eventually became Title IX was originally a proposal to amend Title VI by inserting the word "sex" after the words "race, color."[10] When it was determined that a separate title was appropriate, the House Committee on Education and Labor simply xeroxed Title VI and "marked it up" to produce Title IX.[11] Against this background, and as confirmed by the Congressional hearings held in 1971 and 1972, it is clear that Congress intended Section 901 to have the identical scope as Section 601.

Hearings on the provisions that were to become Title IX were held by the House Special Subcommittee on Education.[12] The principal focus of these hearings was the employment discrimination portion of the

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[10] See note 1, *supra*.

[11] Minutes of the House Committee of Education and Labor, 9-10 (Sept. 30, 1971).

[12] *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) (hereinafter cited as *House Title IX Hearings*). H.R. 16098 was re-introduced in the Ninety-Second Congress as H.R. 7248, the House version of what eventually was enacted as the "Education Amendments of 1972." It was subsection 805(a) of H.R. 16098 that would have amended Title VI to include the word "sex"; this subsection later became Section 901 of Title IX.

legislation (Section 906 which amended Title VII and Section 908 which amended the Equal Pay Act[13]), and not the language pertaining to students that became Section 901. Every witness testifying about employment discrimination did so with specific reference to the employment provisions of the bill.[14] Not one witness related the language taken from Section 601 to employment, except, of course, insofar as employment was recognized as a primary purpose of a particular federal assistance program. Those witnesses who discussed the language that was to become Section 901, including the HEW witness, did so in the context of that provision's protection of the student beneficiaries of specific federally-funded education programs.[15]

Other executive branch testimony also indicated a recognition of the difference between the Section 901 protection of beneficiaries of federal programs and the separate provisions relating to employees. Jerris Leonard, Assistant Attorney General, Civil Rights Division, testified that the Justice Department was not able to support the legislation in the form then under consideration, but wished to suggest an alternative, an alternative which would have provided for HEW jurisdiction over employment practices.[16]

Section 2(a) of the administration proposal was virtually identical to Section 901, as amended, and protected the beneficiaries of federal assistance. To

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[13] 29 U.S.C. § 213.

[14] For examples of such testimony, *see* note 12, *supra*, at 8-9, 27, 79, 128, 159, 304-306, 379.

[15] *Id.* at 210-211, 305-306, 379, 750.

[16] *Id.* at 678-690.

provide employees with protection against discrimination, however, the Justice Department proposed to include an additional subsection, [2(b)], which would have prohibited employment discrimination by "recipient[s] of Federal financial assistance."[17] This proposal, *which was not adopted*, did not include the proposed employment amendments under Title VII and the Equal Pay Act, and would, therefore, have conferred *all* Title IX employment jurisdiction on HEW. The specific employment coverage provided in the proposed new subsection 2(b), moreover, was consistent with the 1964 and 1966 executive branch interpretations mentioned above that the "no person" language found in Section 601 of Title VI did *not* include coverage of employees.

The Petitioner in *Islesboro, supra*, at pages 14-18, attempts to utilize an amendment proposed by Senator Bayh, and certain of the Senator's supporting statements, to establish an intent to provide HEW with jurisdiction over employment.

In response to this contention, Respondent would first note that the proposed amendment offered by Senator Bayh included specific employment discrimination prohibitions that were later incorporated into Title VII and the Equal Pay Act. Second, despite HEW's characterization of the Senator's comments as "clear expressions," the summary of the bill that was read into the Congressional Record *after* the Senator's "clear expressions" stated that the bill would include the following categories:

> "Basic prohibition" (dealing with admissions to educational institutions);

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[17] *Id.* at 690-691.

"Enforcement and Related Provisions" (issuance of regulations, compliance efforts, and funding termination by the agencies providing the federal assistance);

"Employment" (Title VII amendment);

"Equal Pay" (Fair Labor Standards Act amendment).[18]

Only the first two categories, above, remained a part of Title IX at the time the bill received final consideration by Congress. The employment aspects were removed from the legislation when Title VII and the Equal Pay Act were amended to bring educational institution employers within the purview of those laws.

Providing remedies for instances of discrimination against beneficiaries of federal programs was the only intent of Congress in its enactment of Title IX. In this regard, if students are discriminatorily excluded from participation in a federally-assisted program, or denied the benefits thereof, and if corrective efforts fail, then the cutoff of funds to that program prevents the federal government from being in the position of aiding the discrimination. As noted by the circuit court below:

> "[I]t is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefits of federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school

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[18] 118 CONG. REC. 5808 (1972).

> employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits."[19]

If an employee believes he/she has been the subject of discrimination, Title VII, not Title IX, provides the appropriate remedies.

C. Interpreting Section 901 as Applying to Employment Is inconsistent with the Programatically Specific Scope of That Section as well as with the Enforcement Provisions of Section 902.

Section 901 prohibits sex discrimination in any "education program or activity receiving Federal financial assistance." The words "program or activity" have the same meaning as they have in virtually every other federal education statute[20] and refer to the specific program or activity that is authorized by and funded under such statutes. For example, under Title I of the Education Amendments of 1978,[21] a local educational agency may use funds received "only for *programs* and projects . . . designed to meet the special educational needs of [educationally-deprived] children."[22] (Emphasis added) The purpose of the Vocational

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[19] Petition 79-442, *Romeo*, Appendix page 8a.

[20] Consistent congressional usage of the same terms in the same context creates a presumption that their intended meaning is the same. *See* Sutherland, *Statutes and Statutory Construction*, § 47.28.

[21] 20 U.S.C. § 2701, *et seq*.

[22] 20 U.S.C. § 2734.

Education Act of 1963[23] is to extend federal aid to ". . . improve, and where necessary, maintain existing *programs* of vocational education," . . . "to develop new *programs* of vocational education." (Emphasis added) Thus, Title IX, like Title VI,[24] prohibits discrimination in any program or activity authorized by and funded under statutes such as Title I, the Vocational Education Act, and so forth. It has no application to education programs and activities that do *not* receive federal assistance.

The legislative history of Title IX is also clear that Section 901 is program-specific. The original version of Title IX introduced in the Senate by Senator Bayh was an institutional approach; i.e., if a school district receives any federal funding, all of its activities are covered:

> "No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity *conducted by* a public institution . . . which is a recipient of federal financial assistance for any education program or activity, ... (Emphasis added)[25]

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[23] 20 U.S.C. § 2301 (1) and (2).

[24] Title VI, on which Title IX is modeled, was considered an alternative to separate amendments to each individual grant statute to prohibit discrimination in the programs and activities authorized by each such individual statute. See, e.g., *Senate Judiciary Committee Hearings* at 396-397 (colloquy between Senator Ervin and Attorney General Kennedy concerning the list of laws "amended by section 601"); 110 CONG. REC. 1613 (1964) (remarks of Congressman Meader concerning practical difficulties of drafting separate legislative language for each federal assistance program).

[25] 117 CONG. REC. 30156 (1971).

Similarly, the administration's revised proposal, which expressly sought to give HEW employment jurisdiction, would also have covered every program operated by recipient school districts. It was not limited to "programs receiving" federal aid.[26] By prohibiting sex discrimination in every program or activity conducted by recipients of federal aid, these alternative versions would, indeed, have expanded the scope of Section 901 beyond the particular federally-assisted programs. *However, the provision that was enacted* as Section 901 authorized federal jurisdiction only over those *programs* which are "receiving federal financial assistance" and not over every activity conducted by institutions which receive federal aid.[27]

In causing Section 901 to be enacted in identical form to Section 601 of Title VI, which both in language and purpose is limited to federally-funded programs, and rejecting the proposals of Senator Bayh and the administration that would have covered *all* programs operated by recipients of federal assistance, Congress clearly and consciously restricted Section 901 to federally-funded programs.

As stated by the circuit court below:

> ". . . The concern of this particular statute is not with all discrimination against persons in any

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[26] H.R. 5191, 92d Cong., 1st Sess., § 1001(a) (1971). Unlike H.R. 5191, the earlier administration bill, proposed during the Title IX hearings, was programatically specific in the Section 901 portion which protected students. Both administration versions contained additional identical language expressly covering employment and conferring enforcement authority on HEW.

[27] Witnesses testifying during the Title IX hearings also understood the term "program or activity" as used in Section 901 to refer to programs funded under specific grant statutes. See, e.g., *House Title IX Hearings* at 645-661 (testimony of Dr. Peter Muirhead on behalf of HEW).

> way connected with educational institutions which receive federal funding. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex 'under any education program or activity receiving federal financial assistance . . .' Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by § 1681."[28]

D. Section 902: The "Pinpoint Termination" Provision Confirms the Programatically Specific Scope of Section 901.

Section 902, which is the basic enforcement mechanism of Section 901, authorizes each federal agency:

> . . . which is empowered to extend federal financial assistance to any education program or activity . . . to effectuate the provisions of [901] of this title *with respect to such program or activity* by issuing . . . regulations . . . which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance. (Emphasis added)[29]

The regulatory power of HEW is thus limited to "such program or activity" and, as such, is coextensive with

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[28] Petition 79-442, *Romeo*, Appendix pages 6a-7a.

[29] 20 U.S.C. § 1682.

Section 901's coverage of student-beneficiaries in federally-funded programs.

HEW is further authorized to effect compliance with any regulation adopted pursuant to Section 902 by the termination of federal financial assistance "under such program." However, the termination must be limited to "the particular program, or part thereof, in which such non-compliance has been found."[30] In enacting this "pinpoint" provision, Congress made a conscious decision to limit enforcement action to the particular federally-funded educational program or activity in which discrimination is determined to exist. Thus, for example, Title I funds can only be terminated upon a finding of discrimination in the Title I program. A category of assistance can not be eliminated because of discrimination in some other program. Case law has confirmed that this is the remedy under the counterpart legislation, Section 602 of Title VI. *Board of Public Instruction of Taylor County, Florida* v *Finch*, 414 F2d 1068, 1078 (5th Cir. 1969); *Gatreaux* v *Romney*, 457 F2d 124, 128 (7th Cir. 1972); *Mayor and City Council of Baltimore* v *Matthews*, 562 F2d 914, 924 (4th Cir. 1977). Since HEW's remedy under Section 902 must be "pinpointed" to the program or activity receiving federal assistance, it is totally inconsistent to assume that Congress, in Section 901, intended to cover *all* of a school district's employees.

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[30] *Id.*

E. HEW's Employment Regulations Are Inherently Non-Program Specific and Overbroad: HEW's So-Called Infection Theory Is Invalid.

HEW has argued that it has authority to regulate employment practices because sex discrimination in employment may "infect" a school district's operations to such an extent that discrimination against students results. This argument, however, is a "boot-strap" argument, without merit, because the employment regulations fail to mention any impact on the children. Moreover, the cursory investigation conducted by HEW against Romeo failed to make even the slightest inquiry into this area. This is also true in the *Islesboro* case and the *Harris* v *Junior College District of St. Louis* case, *petition for cert. filed*, 48 U.S.L.W. 3118 (U.S. Aug. 6, 1979) (No. 79-201)). Therefore, the "infection theory" has no relevance to the issues presented in the three cases.

CONCLUSION

For the reasons set forth above, there is no basis for this Court to grant the Writs of Certiorari sought by HEW in the *Islesboro, Junior College District of St. Louis,* and *Romeo* cases. The courts are the final authorities on issues of statutory construction and are not merely rubber-stamps for bureaucratic regulations. The unanimity of the courts' decisions clearly demonstrates the lack of ambiguity of the statute and the single-minded rejection of HEW's warped construction/interpretation in its attempt to govern employment through regulations. As such, it is

submitted that the "no person" language of Section 901 protects only the student beneficiaries of federally-assisted education programs, and does not provide general coverage to employees or employment relations. The authority to regulate school districts' general employment practices, which HEW claims to possess, was expressly requested by the executive branch and expressly denied by Congress. By transparent interpretative legerdemain, HEW has attempted to ignore the will of Congress and usurp that body's legislative functions. HEW's bureaucratic lawmaking not only violates the principle of separation of powers, but also undermines fundamental principles of federalism which governed the careful efforts of the Congress.

With respect to discrimination against employees in educational agencies, Congress provided the full panoply of procedures, remedies and safeguards available under Title VII and the Equal Pay Act. With respect to discrimination against students in federally-assisted programs, Congress was careful to pinpoint the enforcement authority so that only the particular program in which discrimination occurs would be affected by a fund cutoff. Congress prohibited intereference with the receipt of federal dollars which are in fact being used in a nondiscriminatory manner to achieve the desirable educational goals intended. HEW's arrogation of the authority to regulate "the entire operation" of local school districts is totally disruptive of the carefully planned statutory structure provided by Congress.

For the reasons hereinbefore set forth, it is submitted that the findings and reasoning of the district court and the Sixth Circuit Court of Appeals are correct. Romeo School District, therefore, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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